

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air)
Warming Devices Products) File No. 15-MD-2666
Liability Litigation) (JNE/FLN)
) Minneapolis, Minnesota
) January 19, 2017
) 9:36 a.m.
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

and

THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

and

THE HONORABLE WILLIAM H. LEARY, III
RAMSEY COUNTY JUDGE

(STATUS CONFERENCE)

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P R O C E E D I N G S

IN CHAMBERS

JUDGE ERICKSEN: First let's identify who we have here. We have a court reporter. It's not Maria because Maria is in -- she's on vacation. We have Judge Noel and we have Judge Leary.

I understand that on your side, in addition to the people who are accustomed to participating by phone, we have -- for the plaintiff we've got Mr. Gordon. Are you there?

MR. GORDON: I am, Your Honor.

JUDGE ERICKSEN: I thought I heard your voice. And then Ms. Zimmerman, I thought I heard you also.

MS. ZIMMERMAN: Yes, Your Honor, I'm here.

JUDGE ERICKSEN: Okay. And Ms. Conlin?

MS. CONLIN: Yes.

JUDGE ERICKSEN: Anybody else on the plaintiffs' side?

MR. SZERLAG: David Szerlag, Your Honor.

JUDGE ERICKSEN: Good morning.

MR. SZERLAG: Good morning.

JUDGE ERICKSEN: And then on the defendants' side I know we have Mary Young. I am going to start with you so I don't forget, Mary Young. Ms. Young, are you there?

1 MS. YOUNG: I am, Your Honor.

2 JUDGE ERICKSEN: And Mr. Blackwell?

3 MR. BLACKWELL: I am. Good morning, Your Honors.

4 JUDGE ERICKSEN: Good morning.

5 Mr. Hulse?

6 MR. HULSE: Yes. Good morning.

7 JUDGE ERICKSEN: Good morning.

8 And Ms. Ahmann?

9 MS. AHMANN: Yes. Good morning.

10 JUDGE ERICKSEN: All right. Anybody else there on
11 the defendants' side?

12 MR. BLACKWELL: That's us, Your Honor.

13 JUDGE ERICKSEN: I don't know whose idea it was to
14 do this by phone, but it seems to be -- well, we'll see, but
15 it seems so far to be a pretty good idea.

16 Was somebody else going to say something there?

17 (Pause)

18 JUDGE ERICKSEN: No. Okay.

19 Let's take a look, then, at the agenda. Is there
20 anything on the pretrial orders or should we go to the
21 plaintiff fact sheets?

22 MR. BLACKWELL: For 3M, I think we can go to the
23 plaintiff fact sheets.

24 COURT REPORTER: If they could identify who they
25 are. I don't know --

1 MR. GORDON: Ben Gordon for plaintiffs. We agree
2 with Mr. Blackwell.

3 JUDGE ERICKSEN: Unless they say otherwise, when
4 it's just a question like this we'll be hearing from
5 Mr. Blackwell on the defendants' side and Mr. Gordon on the
6 plaintiffs' side.

7 MR. BLACKWELL: Right. And Judge Ericksen, there
8 is some discrete areas that within our team we have divvied
9 them up to speak to for the persons directly involved. So
10 if we may, we would like to identify those persons so the
11 Court gets the best information.

12 JUDGE ERICKSEN: Yes, and that's fine. I'm just
13 telling Lori that unless it's someone other than you two, it
14 will be you two and you will identify when it is.

15 All right. So the plaintiff fact sheets.

16 MR. HULSE: Your Honor, this is Ben Hulse. I can
17 speak to that.

18 JUDGE ERICKSEN: All right.

19 MR. HULSE: All right. So to update you from
20 where we were at when we put in the report, so as of last
21 week at the time we put in the report there were about 70 to
22 75 cases that had overdue PSSs, that is, we had not received
23 any at all. Some were two weeks overdue. We've been
24 working with the plaintiffs to address that and the list is
25 now down to 27.

1 We do intend to proceed to seek relief on those
2 27. We think there's been adequate opportunity and notice
3 now at that point to relevant counsel that they needed to
4 either get us a PSS or dismiss the case or let us know if
5 they need an extension and why. These 27, we don't have any
6 of those things, so we do intend to proceed in the near term
7 to seek dismissal of those cases with prejudice.

8 JUDGE ERICKSEN: Okay. And Mr. Gordon, you'll --

9 MR. GORDON: Your Honor --

10 JUDGE ERICKSEN: Go ahead.

11 MR. GORDON: Yes, Your Honor. Thank you. This is
12 Ben Gordon.

13 Briefly, I will agree with Mr. Hulse that
14 significant progress has been made just in the past week,
15 even 48 hours, with respect to the defense contention that
16 PSSs are deficient or overdue.

17 In fact, I think Mr. Hulse would concede that even
18 within the last hour I have notified them of a dispute with
19 respect to one of the remaining 27 in one of my cases where
20 they contend that it has not been served, the PSS. We
21 believe it was served adequately on December 24th.

22 So my view on this globally, Your Honor, is that
23 we have made huge strides in the last week alone with
24 respect to what they believe is deficient and what we
25 believe is deficient and which cases need to be supplemented

1 and which need to be dismissed, and we're working diligently
2 to get that done. I think Mr. Hulse would agree with that.

3 Based on that, I think if the Court would give us
4 until the next status conference before any kind of punitive
5 action is considered with respect to potential orders to
6 show cause or even dismissals of cases, we can have this
7 either eliminated as an issue or refined down to the truly
8 few contested issues.

9 JUDGE ERICKSEN: Well, nothing has been --

10 MR. HULSE: If I may, Your Honor --

11 JUDGE ERICKSEN: Could I just say nothing has been
12 filed yet and so it would be premature for us, I think, to
13 say that there's some new deadline. It sounds like you're
14 working diligently together and if there's a dismissible
15 case, everyone will agree to dismiss it. If there is a
16 reason for the delay in the fact sheet, I imagine Mr. Hulse
17 will be understanding about that. And if there are some
18 legitimate disputes, then there will be a motion filed. But
19 without anything filed right now, I'm not inclined to set a
20 month-away target.

21 MR. HULSE: Thank you, Your Honor. And we're not
22 proposing that. Just wanted to let you know that we have
23 been working with the plaintiffs and that there's this
24 remaining group that there's been no satisfactory action on
25 to remedy, that it's overdue. So we do intend to bring that

1 to the Court for action --

2 JUDGE ERICKSEN: If necessary.

3 MR. HULSE: If necessary, of course.

4 And separate -- there's separately the issue of
5 PSSs that have been received that have a core deficiency as
6 defined in PTO 14. PTO 14 provides the process that we are
7 following. About 75 percent of the PSSs that we've received
8 have one or more core deficiency. I'm sure plaintiffs will
9 dispute some of those. But anyway, we have a process we go
10 through. The notices will start going out today and we'll
11 work through those, as provided by the Court's order.

12 JUDGE ERICKSEN: Very well.

13 Now, on the bellwether selection plan, we're
14 fortunate that Judge Leary was able to come over and be with
15 us here. So who wants to talk about the bellwether
16 selection plan, who wants to start that off?

17 MS. YOUNG: Your Honor, this is Mary Young for the
18 defendants.

19 The first issue with respect to the bellwether
20 selection plan is the parties' joint request that we be
21 allowed a short extension of time until January 31st to put
22 in our 16 nominated cases, and that is just due to our joint
23 belief that it will take us a bit more time to get through
24 all of the PSSs.

25 So Your Honor has an idea, we have received -- of

1 the 150 randomly selected cases, we have received 115 PSSs
2 and two have not been received. The remaining cases the
3 PSSs are not yet due because the bellwether pool included
4 cases filed up through December 19th and those PSSs will not
5 be due for 90 more days. So we are working our way through
6 the group of 115 PSSs on each side to come up with our 16
7 nominated cases.

8 On January 9th the parties put in their joint
9 submission as to what a representative case may look like in
10 the consolidated action and agree that the nominated cases
11 should be either hip or knee procedures and that the kind of
12 random other procedures should not be selected, and that is
13 also before the Court.

14 And in addition, defendants proposed one category
15 and that is that it's our view that the cases should also
16 fall within a staph species bacteria. And we have had an
17 opportunity to do some additional analysis on the 115
18 plaintiff fact sheets that have been received and believe,
19 based on that analysis of both the fact sheet and some
20 company medical records, that about 60 percent of those
21 cases fall within a hip and knee procedure and a staph
22 species bacteria. So it's our view that those cases would
23 be most representative for the first bellwether selection.

24 So that is an issue that was teed up for the Court
25 on January 9th and we would request that the Court delineate

1 both of those categories today and give guidance to the
2 parties for a January 31st nomination date.

3 JUDGE ERICKSEN: You're in agreement about the hip
4 and knee, so that's an easy one. Mr. Gordon --

5 MR. GORDON: Yes, Your Honor.

6 JUDGE ERICKSEN: -- who on your side wants to talk
7 about this staph versus nonstaph infection?

8 MR. GORDON: I'd be happy to step off the curb on
9 that, Your Honor, if I may.

10 JUDGE ERICKSEN: Sure. Look both ways.

11 MR. GORDON: Yes, exactly, Your Honor.

12 First, obviously we agree with the extension to
13 January 31st. I think that's appropriate.

14 I will say that with respect to the further
15 delineation of or stratification of cases along the lines
16 that Ms. Young suggests, Your Honor correctly points out
17 that we agree on the broadest variables in these cases,
18 which are hips, knees, and other types of devices or other
19 types of surgeries, and that those criteria apply broadly to
20 all of the cases under contention and under selection
21 consideration.

22 And to further stratify that based on a
23 controverted issue concerning a very complicated issue
24 relating to causation and other things I think misses the
25 mark with respect to a bellwether selection process. I

1 think it limits the pool unnecessarily and artificially in a
2 way that simply gives us fewer cases to choose from.

3 The Court has already chosen to select from 150
4 cases. The parties agree with the broad division of those
5 among these three areas: hip implants, knee implants, and
6 other.

7 The issue with respect to microbes is very complex
8 and, as I say, disputed because, for example, there are
9 many, many cases within this pool that have unknown microbe,
10 unknown pathogens at this point in time and may forever have
11 unknown pathogens.

12 It is not uncommon, Your Honor, and I think the
13 defense would concede this, for the medical personnel to
14 find a clear infection, they will see lots of neutrophils,
15 other cells that reflect infection, but when they do the
16 culture, they simply do not get a specific positive species
17 cultured out. For some of these plaintiffs it will be
18 unclear whether they are staph or other species.

19 In addition, there are many cases in the mix
20 that -- again, the defense I think would agree -- have
21 multiple species. In fact, I looked at two yesterday where
22 they have both enterococcus species and staph species that
23 contributed to their infection. So what do we do with
24 those?

25 I think it presents a lot of expert issues and

1 factual issues that will simply confound the bellwether
2 process if we add that additional layer, Your Honor.

3 JUDGE ERICKSEN: Well, we've got a couple
4 categories there, you've got staph and you've got unknowns.
5 And on the principle that the bellwether cases should
6 reflect the various categories of cases, I'm prepared to
7 give you an answer. Let me just look to my colleagues here
8 and see if it's all right with them if I just go ahead and
9 rule here.

10 JUDGE LEARY: (Nodding.)

11 MAGISTRATE JUDGE NOEL: What's your answer?

12 JUDGE ERICKSEN: Judge Noel is saying, well,
13 what's your answer.

14 We're not going to limit it to staph. We won't
15 recognize the pathogen subcategory. So we will go ahead
16 with the hip and knee restriction, but not the other. And I
17 will, of course, grant the requested extension to
18 January 31st.

19 MR. GORDON: Thank you, Your Honor.

20 MS. YOUNG: Thank you, Your Honor.

21 JUDGE ERICKSEN: Okay.

22 MS. YOUNG: I think there is one additional issue
23 with respect to the nominations and that's related to the
24 inclusion of Ramsey County cases.

25 JUDGE ERICKSEN: Right. Judge Leary, did you

1 want --

2 JUDGE LEARY: What did you want to say in that
3 regard? And I have reviewed the e-mail that you sent
4 yesterday. But is there anything you want to add?

5 MS. AHMANN: This is Bridget Ahmann. I think
6 we're just looking for some guidance as to what the
7 expectation is. There's noted that each of the parties will
8 choose one to two cases, but we don't know where that falls
9 within the other bellwether workup or setting them for
10 trial.

11 The PSSs in Ramsey County will be due by the end
12 of the month and the parties to identify cases I think by
13 mid February, but I think that we're looking for a little
14 guidance as to where it goes beyond that.

15 JUDGE LEARY: What do you mean by "where it goes"?
16 Are you trying to distinguish between the federally-filed
17 cases and the Minnesota-filed cases?

18 MS. AHMANN: Right. I mean, I think --

19 JUDGE LEARY: I understood your question to be
20 whether or not -- given those bellwether cases, whether or
21 not any of them would be litigated in Ramsey County. And
22 it's always been my understanding that at least one of those
23 cases would be litigated in Ramsey County. Is that your
24 question?

25 MS. AHMANN: Well, I mean, I think it is. So if

1 we're going to -- the Court's order, I think, provides that
2 we agree to eight cases and then there is a workup of six
3 cases. Are we saying that one of those cases is going to be
4 a Ramsey case workup for trial?

5 JUDGE LEARY: I would assume yes unless my
6 colleagues disagree.

7 JUDGE ERICKSEN: I do not disagree. I figured
8 that there would be a Ramsey County workup.

9 JUDGE LEARY: And let me ask you this question in
10 that regard. Is it helpful to the potential resolution of
11 these cases, given their bellwether designation, that you do
12 have one of the bellwether cases -- at least one of the
13 bellwether cases tried in Ramsey County?

14 MS. AHMANN: Yeah, I don't know if it makes a
15 difference in terms of, you know, getting representative
16 cases on board.

17 JUDGE LEARY: Okay. Well, given that it doesn't
18 make a difference, then I would stand by what I said before.
19 At least one of those cases would be Ramsey County.

20 MR. GORDON: Your Honor, from the plaintiffs'
21 standpoint, if you wish for me to respond?

22 JUDGE LEARY: Go ahead, Mr. Gordon.

23 MR. GORDON: Thank you, Judge Leary and Your
24 Honors. You know, we read with interest the defendants'
25 submission with respect to this question. In my re-reading

1 of the scheduling order and the bellwether paradigm, I don't
2 see anything that specifically addresses one way or the
3 other whether once we finalize the list of eight, we presume
4 agreed list of eight, one of those cases must be a Ramsey
5 County case, but I also am happy for the plaintiffs, I
6 believe, to report that we would be fine with that addition
7 or that requirement. We don't think that it necessarily has
8 an impact, you know, one way or the other, but if the Court
9 would prefer that one of the cases selected of the six final
10 cases be a Ramsey County case, we're fine with that.

11 JUDGE ERICKSEN: We're all nodding here.

12 JUDGE LEARY: So this is Judge Leary. I'm
13 agreeable to that and I would anticipate that one of those
14 cases that are designated be a Ramsey County case. And if
15 you want to designate more than one, that's fine too.

16 JUDGE ERICKSEN: But one of the six.

17 JUDGE LEARY: One of the six.

18 JUDGE ERICKSEN: If we're down to six, it will be
19 one of the six.

20 JUDGE LEARY: Any other questions in that regard?

21 (Pause)

22 JUDGE LEARY: I'm not hearing any.

23 JUDGE ERICKSEN: Okay. This is Judge Ericksen.
24 If you're not talking, could you make sure to push mute on
25 your speaker so that we don't hear side conversations and

1 static.

2 MR. GORDON: Your Honor, if I might -- this is
3 Mr. Gordon. I might have one follow-up point that I imagine
4 Ms. Ahmann might have questions or we might both be
5 scratching our heads a little bit here in terms of how
6 things play out and perhaps we can address it later, but
7 with respect to the eight cases, if we agree on eight, I can
8 imagine a scenario in which let's just say each side has
9 selected one Ramsey County case and one or both of those
10 cases potentially could be stricken if each party had a
11 strike. And so what I hear the Court saying is that if
12 there are only one or two cases among the eight, then it
13 would not be appropriate to use a strike to strike one of
14 those cases.

15 JUDGE ERICKSEN: I don't think that's what we're
16 saying. This is just the number that we're -- once
17 everything is said and done and we're down to the list after
18 strikes.

19 MR. GORDON: And I suppose my question, Your
20 Honor, is that if --

21 JUDGE LEARY: Mr. Gordon, if I understand your
22 question, is if one of the cases submitted is a Ramsey
23 County case and the other side strikes it, is that
24 appropriate or not; is that correct?

25 MR. GORDON: Yes, Your Honor. And will we then

1 have to pull up another case to replace that case?

2 JUDGE LEARY: From my point of view, I think
3 that's a fair question and I think it's something that
4 perhaps the judges here need to discuss and perhaps discuss
5 privately.

6 MR. GORDON: Thank you, Your Honor.

7 MR. BLACKWELL: Judge Leary, it's Jerry Blackwell.
8 We are content to cross that bridge when we get there.
9 Obviously there will be some process of being able to strike
10 a Ramsey County case and to be able to replace it with
11 another Ramsey County case. We're content to wait to hear
12 from Your Honors and to cross that bridge when we get there.

13 JUDGE LEARY: From my point of view I think,
14 Mr. Blackwell, that's a reasonable way of looking at it. It
15 will also allow the judges here an additional opportunity to
16 figure out where we want to go if we do have to come to that
17 point.

18 JUDGE ERICKSEN: Okay. Just give us a moment
19 here. I'm going to put you on mute. Don't go away, but
20 we're going to take a 30-second conversation and see if we
21 can give you an answer now on that. Hold on one second.

22 (Judge Ericksen, Judge Leary, and Magistrate
23 Judge Noel confer off the record)

24 JUDGE ERICKSEN: All right. We're back. Here's
25 the situation. We agree that it makes sense to have a

1 bellwether trial in a Ramsey County case if possible. And
2 so my thought is that if there are strikes such that we're
3 left without a Ramsey County case, then you'd pull another
4 one.

5 And the question that would be left potentially
6 for another day is if there's something about that process
7 that becomes really problematic and then, as with any other
8 unforeseen problem, we can cross that bridge.

9 But in terms of the planning, we're looking at
10 ending up with a Ramsey County case and if that means you
11 pick another one to replace a strike, then that's what it
12 means.

13 JUDGE LEARY: This is Judge Leary. I'm in
14 agreement with that.

15 MAGISTRATE JUDGE NOEL: As am I.

16 JUDGE ERICKSEN: And as is Judge Noel.

17 MR. GORDON: Thank you, Your Honors.

18 MR. BLACKWELL: Thank you.

19 JUDGE ERICKSEN: Does that take the suspense out?

20 MR. GORDON: For the time being. We'll mount it
21 again later.

22 MR. BLACKWELL: Agreed.

23 JUDGE ERICKSEN: Okay. And then the foreign
24 discovery is concluded, as I understand. Is there anything
25 to discuss about that?

1 MAGISTRATE JUDGE NOEL: I was just going to say
2 there was some kerfuffle at the last moment on the
3 deposition of Dr. McGovern, as I recall, and I guess my only
4 question -- this is Frank Noel. My question is: Are there
5 any lingering issues or has that been resolved as a result
6 of the last e-mails and telephone messages?

7 MS. CONLIN: It's been -- this is Jan Conlin.
8 It's been resolved, Your Honor.

9 MAGISTRATE JUDGE NOEL: Thank you.

10 MR. BLACKWELL: Thank you, Jan. We concur.

11 MAGISTRATE JUDGE NOEL: Okay. Thank you.

12 JUDGE ERICKSEN: All right. And then there's some
13 action on the St. Louis cases that will proceed according to
14 the outline that is here in the joint agenda. I don't think
15 there's anything we need to do about that right now. Is
16 there?

17 MR. BLACKWELL: Judge Ericksen, Mr. Hulse will
18 speak to this, but I think the Court should be aware of what
19 seems to be emerging in the city of St. Louis.

20 MR. HULSE: I don't want to belabor this, Your
21 Honor, but basically that a plaintiffs' firm is trying to
22 start another MDL in St. Louis in the City of St. Louis
23 Court, split up the plaintiffs to avoid CAFA mass action
24 removal and then, you know, included one Minnesota defendant
25 in each case to defeat diversity. So we've removed under

1 fraudulent joinder and lack of personal jurisdiction
2 arguments. We've filed the tag-along.

3 Plaintiffs are objecting in the JPML to transfer,
4 so that will play out -- they've also sought remand. So
5 that will be playing out in the Eastern District of Missouri
6 as well. But depending on how things shake out, it may
7 be -- subject matter jurisdiction, personal jurisdiction
8 issues may well land before Your Honor.

9 JUDGE ERICKSEN: But there's nothing here now?

10 MR. HULSE: Not at this point.

11 MR. GORDON: Your Honor, this is Ben Gordon. I
12 would just say that while plaintiffs in the MDL don't have a
13 dog in this fight, so to speak, you know, just in terms of
14 Mr. Hulse's characterization, I would say that obviously I
15 think the plaintiffs' lawyers in Missouri have followed
16 whatever they believe are appropriate -- their prerogatives
17 under state law in Missouri and that process needs to play
18 itself out, you know, until and unless it's before this
19 Court, which it's not.

20 MAGISTRATE JUDGE NOEL: Frank Noel here. I think
21 you just answered the question I have, but just to be clear,
22 so the plaintiffs' lawyers who have filed these Missouri
23 actions do not have any plaintiffs who are in the MDL as we
24 speak?

25 MR. BLACKWELL: For 3M, we don't know the answer

1 to that at this time. We're sort of looking at each other
2 around the table here and, Judge Noel, we don't know the
3 answer to that yet.

4 MAGISTRATE JUDGE NOEL: Mr. Gordon, do you know?

5 MR. GORDON: I absolutely do not, Your Honor. I
6 agree with Mr. Blackwell, none of us knows the answer to
7 that. My assumption is that they do not have any cases in
8 the MDL, but I do not have an answer for you today.

9 MAGISTRATE JUDGE NOEL: Okay.

10 JUDGE ERICKSEN: Thank you.

11 MS. CONLIN: This is Jan Conlin. To be clear, I
12 don't want the Court left with some impression that there
13 is, you know, some acquiescence or blessing on our part on
14 what's going on. I think Mr. Gordon stated it correctly,
15 which is folks are doing something down there and we're
16 not -- it's not part of anything that we're a part of.

17 MR. GORDON: Correct, yes.

18 MAGISTRATE JUDGE NOEL: And as I understand it,
19 it's simply two cases with multiple plaintiffs in each case;
20 is that correct?

21 MR. HULSE: That's right, Your Honor. They --

22 JUDGE LEARY: Would you identify yourself, please.

23 MR. HULSE: I'm sorry, Your Honor. It's Ben
24 Hulse. It's more than 100 plaintiffs collectively, but to
25 avoid mass action removal under CAFA, they split it into two

1 groups of just over 50 and then divided their Minnesota
2 defendants [sic] between the cases to defeat diversity.

3 MAGISTRATE JUDGE NOEL: Okay.

4 MR. HULSE: I mean the Minnesota plaintiffs.

5 MAGISTRATE JUDGE NOEL: Thank you.

6 JUDGE ERICKSEN: All right. We'll step off that
7 curb when we have to.

8 MR. GORDON: We're all going to be using that
9 expression.

10 JUDGE ERICKSEN: I love it.

11 MR. GORDON: In fairness, Your Honor, I borrowed
12 that from His Honor Judge Frank.

13 JUDGE ERICKSEN: The reason I like it is I might
14 have mentioned before the connection with this, but I lived
15 in England for two years and one of the things that has
16 forever been on my mind is which way to look when I step off
17 the curb because tourists are constantly getting run over
18 because they look the wrong way when they step off the curb
19 and then a double-decker bus creams them.

20 And as a child I read a spy novel where somebody's
21 identity was given away as a spy because she looked to the
22 left rather than the right. So that's part of why I like
23 that expression.

24 Anyway, the other state court proceedings, I
25 didn't see any discussible issues there, but any -- am I

1 wrong about that? And I am including the Canadian action in
2 that.

3 MR. BLACKWELL: Your Honor, for 3M, we agree with
4 Your Honor, nothing there to add.

5 MR. GORDON: Same for plaintiffs, Your Honor.

6 JUDGE ERICKSEN: Okay. And then on the discovery,
7 anything you want to bring up at this point?

8 MR. HULSE: Yes, Your Honor. It's Ben Hulse. You
9 will be seeing or Judge Noel will be seeing another motion
10 with respect to Dr. Augustine's compliance with the
11 subpoenas and his prior order. I think that's likely to go
12 on file today or tomorrow and I think we've reserved a
13 hearing spot for February 6th. Another issue that we will
14 be addressing is noncompliance with the Court's order for
15 payment of fees and costs too, which are still outstanding.
16 So that's the status there. We have continued
17 Dr. Augustine's deposition while we continue to pursue these
18 compliance issues.

19 MAGISTRATE JUDGE NOEL: So the deposition won't --
20 so we had a date -- Frank Noel here. We had a date earlier,
21 I thought, for issues relating to Dr. Augustine and then
22 that got moved.

23 (Magistrate Judge Noel and law clerk confer)

24 MAGISTRATE JUDGE NOEL: Never mind. Strike that.

25 MR. HULSE: I think February 6th is the date that

1 we have a hearing.

2 MAGISTRATE JUDGE NOEL: And so the deposition of
3 Dr. Augustine will not occur until after whatever we rule on
4 whatever motions you bring on that February 6th date; is
5 that correct?

6 MR. HULSE: That's correct, Your Honor.

7 MAGISTRATE JUDGE NOEL: Okay.

8 MR. HULSE: Continuing on to the completion of the
9 defendants' e-mail production, we have been working
10 expeditiously to complete that. We've got nearly 90
11 reviewers who have been working nonstop to complete it.

12 The plaintiffs, we appreciate, were willing, after
13 we shared our plan with them to complete the rolling
14 production, were agreeable to continue the deadline to
15 complete that production to January 31st and we just ask the
16 Court's approval on that agreement.

17 JUDGE ERICKSEN: So given.

18 MR. HULSE: On depositions, Your Honors, what's
19 going on is laid out here in summary and I won't repeat it
20 and would just defer to anything that the plaintiffs'
21 counsel would like to add.

22 MR. GORDON: This is Mr. Gordon, Your Honors. I
23 would say I agree with Mr. Hulse, it's laid out here.
24 There's been additional work that continues, a deposition
25 yesterday. We've been very cooperative in moving certain

1 depositions to accommodate the new discovery schedule. I
2 think there are some additional discovery requests we will
3 be submitting with respect to third parties, very limited,
4 but those are not ripe. And I agree with Mr. Hulse there's
5 nothing too controverted to dispute today.

6 JUDGE ERICKSEN: Very well. Any random thoughts,
7 Mr. Gordon, that you want to share?

8 (Laughter)

9 MR. GORDON: Well, I enjoyed your anecdote about
10 the double-decker bus. I will tell you that when my
11 daughter was five years old she was living in London or near
12 London in the Harrogate area and so I had an opportunity to
13 study abroad while in law school and for a semester I spent
14 time over there and had that exact incident you're
15 describing occur where I was holding her hand and she's five
16 years old and she stepped off the curb almost directly in
17 front of a red double-decker bus and all the people gasped.
18 It's a common occurrence. Fortunately she was not smashed.

19 JUDGE ERICKSEN: Yeah. I think that the media
20 suppresses the numbers, at least there was talk of that when
21 I was over -- I taught trial practice there not too long ago
22 and it was still going on and I said, How come we never read
23 about this? Why do you have to come over here to experience
24 it? Of course everyone said it's because the tourist bureau
25 doesn't want people to know how many tourists get flattened

1 on the street.

2 Mr. Blackwell, any random thoughts on your part?

3 MR. BLACKWELL: Your Honor, I've never had an
4 issue stepping off the curb in my life.

5 (Laughter)

6 JUDGE ERICKSEN: You know, you always struck me as
7 a person who knows which way to look.

8 (Laughter)

9 MR. BLACKWELL: Last random thought. I just last
10 Saturday ordered eight more beehives to get ready for the
11 season.

12 JUDGE ERICKSEN: Oh.

13 MR. BLACKWELL: My final random thought, spring
14 will be here.

15 JUDGE ERICKSEN: Wow. I didn't even -- I must
16 have been out of the room when you revealed that you're a
17 beekeeper.

18 MR. BLACKWELL: Yes, I do. So there are 16 hives.
19 They are all ready. I'm looking to get eight more for next
20 season.

21 JUDGE ERICKSEN: Wow.

22 MS. CONLIN: Mr. Blackwell, we're looking forward
23 to you sharing some of your honey with the rest of us.

24 MR. BLACKWELL: I may not bring you honey, but
25 I'll bring you my sweetness. Okay?

1 (Laughter)

2 JUDGE ERICKSEN: Well, okay. Thanks, everybody.

3 MR. BLACKWELL: Thank you, Your Honor.

4 JUDGE ERICKSEN: It's been a pleasure.

5 MR. GORDON: Thank you very much, Your Honor.

6 JUDGE ERICKSEN: We'll meet again. We're in
7 recess.

8 (Court adjourned at 10:10 a.m.)

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13 I, Lori A. Simpson, certify that the foregoing is a
14 correct transcript from the record of proceedings in the
15 above-entitled matter.

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17 Certified by: s/ Lori A. Simpson

18 Lori A. Simpson, RMR-CRR

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